

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Request for Competitive Classification)	No. UT-990022
of High Capacity Circuits Provisioned)	
at Capacities of DS-1 and Above within)	TRACER'S COMMENTS
the Greater Seattle and Spokane)	ON USWC'S AMENDED
Business District Areas)	PETITION
<hr/>		

On June 11, 1999, U S WEST Communications, Inc. ("USWC") filed an amended petition seeking competitive classification of its high capacity services in only the following wire center areas: Seattle Campus, Seattle Main, Seattle Elliot, Seattle Duwamish, Bellevue Glencourt wire centers, and downtown Spokane (the business district wholly within the Riverside and Keystone wire centers, bounded on the north by the Spokane River, on the east by Perry Street, on the south by 11th Avenue, and on the west by Ash Street). The amended petition was the result of a settlement between USWC and the Commission Staff.

In these comments TRACER responds to the arguments raised by USWC and the Commission Staff in their respective Reply Comments submitted in support of the Amended Petition. In addition, TRACER addresses the FCC's recent decision in its Access Charge Reform Proceeding establishing a new pricing flexibility framework for incumbent LEC ("ILEC") special access and dedicated

1 transport services.¹ In short, the FCC framework is seriously
2 flawed, fails to satisfy the statutory mandates set forth in
3 Washington law, and is largely irrelevant to this inquiry.

4 Although the geographic area in which USWC seeks competitive
5 classification has been significantly reduced over that
6 originally requested, the company still has failed to demonstrate
7 that effective competition exists in the newly defined relevant
8 market. Indeed, evidence submitted by USWC and developed by
9 other parties demonstrates clearly that USWC retains market power
10 and a significant captive customer base in the areas covered by
11 the Amended Petition.

12 Accordingly, the Washington Telecommunications Ratepayers
13 Association for Cost-based and Equitable Rates ("TRACER")
14 recommends that the Commission (i) deny the Amended Petition or
15 (ii) only grant it subject to the express condition that prices
16 for high capacity services in the relevant geographic market not
17 be increased above present tariff rate levels. Such a limitation
18 on upward pricing flexibility would effectively constrain USWC and
19 prevent it from abusing its market power.

25 ¹ Fifth Report and Order and Further Notice of Proposed
26 Rulemaking, In the Matter of Access Charge Reform, CC Docket No.
96-262, FCC 99-206, released August 27, 1999 ("Pricing
Flexibility Order").

1 DISCUSSION

2 USWC'S Approach to Satisfying the Statutory Test for Competitive
3 Classification Fails to Provide Any Meaningful Demonstration That
4 the Company Lacks Market Power Over High Capacity Services; In
5 Fact Clear Evidence Exists That USWC Retains Market Power Over
6 These Services

7 As noted in TRACER's Comments on USWC's original petition,
8 under the terms of the Regulatory Flexibility Act, a regulated
9 carrier may only be granted competitive classification for
10 services that are shown to be subject to effective competition.
11 Competitive classification carries with it considerable pricing
12 flexibility; the only limitation is that competitive services not
13 be priced below cost.² Contracts for competitive services are
14 also exempt from the statutory prohibitions against undue
15 discrimination and preference.³

16 RCW 80.36.330 provides that "[e]ffective competition means
17 that customers of the service have reasonably available
18 alternatives and that the service is not provided to a
19 significant captive customer base." That statute sets forth the
20 following factors that the Commission should consider, among
21 others, in evaluating whether a service is subject to effective
22 competition:

- 23 (a) The number and size of alternative providers of
24 services;

25
26 ² RCW 80.36.330(2), (3).

³ RCW 80.36.170; RCW 80.36.180.

1 (b) The extent to which services are available from
2 alternative providers in the relevant market;

3 (c) The ability of alternative providers to make
4 functionally equivalent or substitute services readily
5 available at competitive rates, terms, and conditions; and

6 (d) Other indicators of market power, which may
7 include market share, growth in market share, ease of entry,
8 and the affiliation of providers of services.

9 The purpose of requiring a regulated carrier to demonstrate
10 the existence of effective competition is to ensure that: (1) the
11 carrier cannot use pricing flexibility to deter efficient entry
12 or engage in exclusionary pricing behavior; and (2) the carrier
13 cannot increase rates to unreasonable levels for customers that
14 lack competitive alternatives. However, USWC's approach to
15 satisfying the statutory test of showing that effective
16 competition exists fails to provide any meaningful demonstration
17 that the company lacks market power.

18 While USWC asserts that it has satisfied the statutory test
19 of showing that effective competition exists for these services,
20 as with its original petition, the company's comments and
21 accompanying exhibits offered in support of the Amended Petition
22 demonstrate little more than the fact that alternative sources of
23 supply exist for some high capacity service customers in the
24 areas covered by the Amended Petition. In short, the Amended
25 Petition suffers from the same shortcomings that the original
26 petition did. Accordingly, TRACER believes that the criticisms

1 it made of USWC's original petition and demonstration also apply
2 to the company's Amended Petition. It, therefore, incorporates
3 those comments here.

4 As discussed in TRACER's original comments⁴, the appropriate
5 test for the presence of effective and price-constraining
6 competition is the absence of market power on the part of the
7 dominant firm, USWC. According to economic theory, the degree of
8 market power enjoyed by a dominant firm is indicated by the
9 firm's ability to raise and sustain prices above the competitive
10 level (i.e., marginal cost). If the market for a service is
11 subject to effective competition, a firm could not successfully
12 or profitably sustain prices above the competitive level by even
13 a small but significant amount (e.g., a price increase in the
14 range of 5-10%); customers would simply turn to an alternative
15 provider charging the competitive price.

16 There are several objective analytical approaches identified
17 in the literature that can be used to evaluate a firm's market
18 power, i.e., its ability to price above cost. Three of these
19 approaches involve variations of the so-called "Lerner Index,"
20 and are based upon consideration of such factors as the dominant
21 firm's market share, the market price elasticity of demand, the
22 elasticity of supply of the competitive fringe, and the firm
23 price elasticity of demand.⁵ A fourth approach, the Herfindahl-

24
25 ⁴ Comments of TRACER at 4-8, dated April 9, 1999.

26 ⁵ The first measure is the original Lerner Index
formulated by A. B. Lerner in his classic work, "The Concept of
Monopoly and the Measurement of Monopoly Power," Review of

1 Hirschman Index (HHI) involves the level of concentration in the
2 market. While it is not a measure of market power, it can
3 provide useful information about the nature of the market in
4 question.⁶

5
6 Economic Studies 1 (June 1934), at 157-175. The Lerner Index is
7 defined as:

$$(Price - Marginal Cost)/Price.$$

8
9 This is essentially a measure of the price/cost relationship. In
10 a competitive market, the Lerner Index would be zero, as firms
11 could not price above the competitive level. The greater that
price exceeds marginal cost, the higher the value of the Lerner
Index, with the upper bound being 1.

12 The second measure is the Lerner Index as formulated by
13 William M. Landes and Richard A. Posner in their paper, "Market
14 Power In Antitrust Cases," Harvard Law Review, Vol. 94 (March
15 1981), at 937-995. The Lerner Index is defined as a function of
market share, market elasticity of demand, and elasticity of
supply:

$$\frac{\text{Market Share}}{\text{Market Demand Elasticity} + [\text{Supply Elasticity} \times (1 - \text{Market Share})]}$$

16
17 This essentially means that a firm's market power varies
18 directly with its own market share, and varies inversely with the
19 relevant elasticities of demand and supply. Stated another way,
20 the ability of a firm to price above cost is greater, the greater
its own share of market, and the lower either the market
21 elasticity of demand or the elasticity of supply of competing
firms.

22 The third measure is the "firm elasticity of demand." The
23 lower the price elasticity of demand facing the firm in question,
the smaller the loss in sales it will suffer if it raises prices,
and the greater the ability of the firm to set prices above cost.

24 ⁶ The fourth measure is the HHI Index, which is the sum
25 of the squares of the shares of the firms in the market in
question. For example, a monopoly market would produce an HHI of
26 10,000; a market split by two firms would produce an HHI of
5,000. The Department of Justice in its Horizontal Merger
Guidelines considers an industry with an HHI of 1,800 to be
highly concentrated.

1 While some data is available on market shares, reliable data
2 about elasticity of supply, and elasticity of demand have not
3 been provided. In fact, USWC objects to TRACER's criticism that
4 the company has provided no objective measure of its market
5 power. It first objects to providing price elasticity measures,
6 arguing that they are difficult to generate and require the
7 observation of the effects of price changes over a long period of
8 time. In the past USWC has routinely provided elasticity
9 estimates for its services, including private line services, in
10 order to support repression and stimulation adjustments required
11 by rate adjustments.⁷ Moreover, USWC has been providing private
12 line and special access services, including high capacity
13 services, for a considerable period of time. It also enjoys the
14 benefit of being able to observe customers' responses to price
15 changes in several states. For the most part, it has been the
16 sole provider of private line and special access services in the
17 marketplace. It has also demonstrated in this proceeding that it
18 is capable of assembling the prices charged by its competitors
19 from the Commission's Record Center. Thus, while it may be
20 difficult to produce reliable elasticity estimates for the firm
21 and for the market, USWC is in the best position to do so. The
22 only conclusion that can be drawn is that USWC has not produced
23 objective evidence of its market power because it does not like
24 what that evidence would show.

25
26 ⁷ Evidence in Docket No. U-88-2052-P indicated that past
elasticity studies showed PNB's private line services to be price
inelastic.

1 Instead of presenting evidence showing that high capacity
2 services are price inelastic, USWC relies on an FCC statement
3 indicating that "the demands of business customers are highly
4 elastic, because they are sophisticated buyers who typically
5 receive and evaluate competing proposals from several vendors."⁸
6 However, this FCC observation deals with interstate toll
7 services, which are fundamentally different than the services at
8 issue here. Moreover, the observation applies, if at all, only
9 in situations where there are in fact several vendors. As with
10 much of its presentation in this case, USWC starts with the
11 conclusion it wants to reach and then works fitfully backward in
12 an attempt to justify it. Here, however, the evidence is strong
13 that multiple suppliers are not available to many customers. In
14 that case, it does not make any difference whether a customer is
15 large or small. If it has no choices, it is a captive of the
16 incumbent LEC, USWC.

17 The point remains that USWC's comments and supporting
18 documentation offer no objective demonstration of the absence of
19 market power. Notwithstanding this failure on USWC's part, there
20 is objective evidence in this record that suggests that USWC
21 retains a high degree of market power over high capacity
22 services. As discussed in TRACER's original comments, one
23 objective measure of market power is the Lerner Index as
24

25 ⁸ USWC's Reply Comments at 37-38, dated June 11, 1999,
26 quoting Attachment L, Alfred E. Kahn & Timothy J. Tardiff,
Economic Evaluation of High-Capacity Competition in Seattle, page
12.

1 originally formulated.⁹ This is a measure of the price/cost
2 relationship and is expressed as: (Price - Marginal Cost)/Price.
3 In a competitive market, the Lerner Index would be zero, as firms
4 could not price above the competitive level. The greater that
5 price exceed marginal cost, the higher the value of the index,
6 with the upper bound being 1. Here, USWC effective suggests the
7 comparison to make: the rates charged by USWC and its competitors
8 for channel terminations v. the cost for a four-wire loop.¹⁰ The
9 price of a four-wire unbundled loop approved by the Commission in
10 its 17th Supplemental Order in Docket No. UT-960369, ¶¶ 525, 527,
11 is \$33.60. The USWC DS-1 channel termination price of \$150.00 is
12 4.46 times that. This implies a Lerner Index in the range of
13 .776. This high Lerner Index provides a strong indication that
14 the market for high capacity services, at least that for channel
15 terminations, is not competitive.

16 Clearly, the price prevailing the market for high capacity
17 channel termination services is well above the competitive level.
18 Whatever competition there is for such services is certainly not
19 exerting much of a constraint on USWC. Moreover, the competitors
20

21 ⁹ Comments of TRACER at 6, n.5, dated April 9, 1999.

22 ¹⁰ At page 12, line 18 through page 13, line 2 of its
23 Reply Comments, dated June 11, 1999, USWC asserts that the market
24 rates for DS-1 channel terminations range from \$103.50 (GST) to
25 \$150.00 (U S WEST) to \$550.00 (Teligent, Inc.). The DS-3 channel
26 termination rates range from \$1,215.00 (GST) to \$1282.00 (U S
WEST) to \$5,000.00 (Teligent, Inc.). At page 16 of its Reply
Comments, USWC asserts that its unbundled element prices are
substantially less than its current high capacity tariff rates,
thereby providing a large margin for competitors. At n.29 USWC
makes the direct comparison between the price of a four-wire
unbundled loop and the DS-1 channel termination rate.

1 such as Teligent, by charging prices well in excess of USWC's,
2 are not constraining USWC ability to charge supra-competitive
3 prices.

4 The company's comments continue to focus mainly on the
5 existence of backbone CLEC networks in the geographic markets
6 covered by the Amended Petition and speculations as to the
7 potential for competitive buildout.

8 While no one would dispute that there exist some
9 alternatives to USWC high capacity services in the covered areas,
10 the important point is not that such alternatives exist (they do,
11 in limited situations), but that there has been no real
12 demonstration that the alternatives exist throughout the covered
13 areas or that they provide constraints on USWC's ability to price
14 high capacity services. The mere existence of alternative
15 sources of supply for some customers does not equate to effective
16 competition in any meaningful economic sense of the term.

17 Because USWC's and the Staff's emphasis on the existence of
18 fiber backbone networks in the defined geographic areas and the
19 lack of evidence about the actual availability of CLEC facilities
20 over the "last mile" to the customers' premises, there has been
21 an abject failure to demonstrate that more than just a select
22 number of customers actually have facilities-based alternatives
23 available to them.

24 With USWC's original petition there was considerable
25 uncertainty about where CLECs were actually providing facilities
26 to the end-user. That is one reason why TRACER originally

1 recommended that the size of the relevant market be reduced to
2 focus on the area of highest concentration of multi-tenant, high-
3 rise buildings, and the highest concentration of backbone
4 facilities. Evidence available in connection with USWC's
5 original petition suggested that CLECs served only 4.5% to less
6 than 12% of the existing high capacity customer locations.¹¹

7 More specific information about the number of high capacity
8 service locations served by USWC and by CLECs in each of the wire
9 center areas covered by the Amended Petition is now available.¹²
10 That information shows that CLECs serve less than 10% of the
11 buildings with high capacity service customers in the Seattle
12 Main wire center area, less than 1% of those in Seattle Duwamish,
13 12% in Seattle Elliot, none in Seattle Campus¹³, .2% in Bellevue
14 Glencourt, and insufficient data for a comparison was provided
15 for Spokane. This evidence alone is sufficient to compel a
16 conclusion that USWC retains a significant captive customer base
17 in the relevant geographic market.¹⁴

18
19 ¹¹ Comments of TRACER at 13-14, dated April 9, 1999.

20 ¹² Staff Revised Confidential Attachment B.

21 ¹³ The information provided in Revised Confidential
22 Attachment B refers to the Seattle Lakeview wire center, not
23 Seattle Campus. At this point it is unclear whether the data was
24 simply mislabeled or actually refers to the wrong wire center.
Pending further clarification, TRACER assumes the data relates to
Seattle Campus but was mislabeled.

25 ¹⁴ It should also be noted that these figures refer only
26 to present high capacity customer locations and do not reflect
the fact that any new customer located in a different building
would also be a captive of USWC. Further, the figures for the
number of CLEC buildings in Staff's Revised Confidential
Attachment B represent a summation of the information provided by

1 USWC objects to reliance on evidence of the number of
2 buildings served by CLECs in deciding whether to grant
3 competitive classification.¹⁵ However, if CLECs are not in a
4 particular building, the customers in that building do not have a
5 choice of providers. Plain and simple. Just because USWC wants
6 competitive classification does not excuse abandoning the
7 standards for deciding whether effective competition exists.

8 As TRACER and other intervenors have pointed out previously,
9 the mere existence of backbone facilities does not mean that
10 there are CLEC facilities connecting end-user locations to the
11 backbone. Stated another way, just because the freeway passes
12 near your house does not mean there is an exit ramp to your
13 driveway. For example, the PACCAR headquarters building in
14 downtown Bellevue has no CLEC facilities entering it, even though
15 CLEC backbone facilities pass nearby, according to the USWC maps
16 submitted in this proceeding.¹⁶ Without the availability of an
17 alternative provider's facilities and services, on reasonably

18 _____
19 individual CLECs. It is likely that multiple CLECs serve the
20 same buildings; therefore, the figures in the attachment
overstate the actual presence of competition.

21 ¹⁵ USWC's Reply Comments at 24, dated June 11, 1999.

22 ¹⁶ This is not because PACCAR refuses or would impose any
23 burden on an entering CLEC; nor is it because of any agreement
24 restricting access to its building. CLECs have simply been
25 unwilling to extend facilities to the building unless PACCAR
26 agrees to pay the costs of extending the facilities or agrees to
a long-term contract to ensure recovery of the required
investment. Even assuming a CLEC would extend its facilities to
the PACCAR building under those circumstances, that does not mean
that PACCAR would have a reasonable alternative to USWC's service
or that the offer of the CLEC's service would act as a
constraining influence on USWC's pricing.

1 comparable terms and conditions, a customer is effectively an
2 economic captive of the incumbent LEC. It makes no difference
3 why a CLEC does not extend its facilities; the key point from the
4 customer's perspective is that the facilities are not available.

5 USWC points to information from WAISP that 5 ISPs subscribe
6 to 12 DS-1s from NEXTLINK, 7 from ELI, and 19 from USWC as
7 evidence that competitive alternatives are widely available.
8 What USWC fails to mention is that a number of ISPs, at least in
9 the Seattle area, are located in the same building. Just because
10 one building is served by multiple CLECs does not translate into
11 effective competition throughout that or any other wire center
12 area.

13 **The Availability of Unbundled Network Elements Cannot Be Relied**
14 **Upon As the Basis for a Finding of Effective Competition Until a**
15 **Number of Service Quality, Provisioning, Interconnection, and**
16 **Collocation Issues Have Been Resolved**

17 USWC complains that intervenors argue that Section 271
18 relief and resolution of interconnection, collocation, carrier-
19 to-carrier service quality standards, and MCI provisioning
20 complaint issues must be resolved before competitive
21 classification can be granted.¹⁷ The company claims these issues
22 are the subjects of other dockets and are irrelevant to this
23 proceeding.

24 USWC misunderstands the point being made. If competitive
25 classification is to be based, even in part, on the availability
26 of unbundled elements, as USWC suggests at page 16 of its Reply

¹⁷ USWC's Reply Comments at 4-5, dated June 11, 1999.

1 Comments, the issues surrounding the timely, adequate, and
2 nondiscriminatory availability of UNEs, interconnection, and
3 collocation must be resolved before it can be said that UNE
4 availability can provide the basis for a finding of effective
5 competition. In their absence, only the actual availability of
6 facilities-based alternatives can produce and justify a finding
7 of effective competition.

8 Further, for some high capacity services, the UNEs that have
9 been ordered to date are not sufficient to constitute reasonable
10 substitutes-e.g., four-wire copper loops will not suffice for DS-
11 3 or SONET services. Fiber is required.

12 **In Addition to the General Inadequacy of USWC's Demonstration of**
13 **Effective Competition, There Is a Complete Lack of Evidence About**
14 **the Availability of Substitutes for Alternate Route Protection**
and SONET Services

15 In addition to the general inadequacy of the demonstration
16 of effective competition presented by USWC, there is a complete
17 lack of evidence, analysis, or discussion of the availability of
18 substitutes for specific services covered by the Amended
19 Petition. For example, while USWC's self-healing alternate route
20 protection services ("SHARP") and self-healing network services
21 ("SHNS") apparently are covered by the Amended Petition, no
22 discussion is presented about the availability of reasonable
23 substitutes for them. This is particularly true for alternate
24 route protection services between multiple locations. Moreover,
25 as recognized by the Staff in its Reply Comments at page 4:
26

1 [I]t is important to recognize that for the services at
2 issue here the presence of a single alternative
3 provider is unlikely to provide price-constraining
4 competition. Because every network will fail on
5 occasion, diversified service has great value. US West
6 provides diversified routes at great expense. The
7 opportunity to obtain service from another competitor
8 has this same value, so prices would not be forced
9 down. Two providers could still exercise market power.

10 The same is true for SONET services. There has been no
11 analysis of the extent of options for requiring SONET services
12 (services delivered in an optical v. electronic format).

13 **USWC Misunderstands TRACER's Point About the Danger to Consumers**
14 **of Prematurely Granting Upward Pricing Flexibility When Only Some**
15 **Customers Have Choices**

16 USWC asserts that full regulation of its high capacity
17 services in the Seattle and Spokane areas is not necessary to
18 protect consumers. It then notes TRACER's argument that, given
19 the fact that competitive classification includes exemption from
20 the prohibitions against undue discrimination and preference¹⁸
21 for individual customer contracts, premature competitive
22 classification of a geographic market that had competitive
23 alternatives for only some, but not all, customers could damage
24 the customers with no alternatives. As noted in TRACER's
25 original comments, USWC could lock-in with long-term contracts

26 ¹⁸ RCW 80.36.170; 80.36.180.

1 those customers with choices and increase the prices (through
2 price list changes) charged to those customers who lack
3 alternatives.¹⁹ USWC asserts: "The fallacy of this argument is
4 that it assumes that customers will not have a choice. However,
5 if the Commission classifies a service as competitive, that means
6 that there are choices."

7 USWC misses the point of TRACER's argument. The point is
8 that if the relevant market does not have alternatives for all
9 customers, the customers without choices can be harmed by USWC
10 unreasonably raising prices. As Staff points out in its Reply
11 Comments: "While it might be impractical to vary prices among
12 customers in a mass market service such as long distance calls,
13 it would be relatively easy to do so for these services, which
14 are typically designed and provisioned on a customer-by-customer
15 basis anyway." In other words, if there is any sizable number of
16 customers in the relevant market who do not have competitive
17 choices, premature competitive classification would permit USWC
18 to abuse its market power over those customers.

19 Here there is not sufficient evidence to conclude that there
20 is no significant captive customer base. Indeed, the evidence on
21 the number of buildings served by CLECs discussed above is clear
22 and convincing proof that USWC retains a significant captive
23 customer base in the areas covered by the Amended Petition.
24 TRACER understands that, having reached a partial settlement with
25 USWC, the Staff is obligated to support the Amended Petition;

¹⁹ Comments of TRACER at 19, dated April 9, 1999.

1 however, that does not justify ignoring clear evidence of the
2 lack of effective competition in the revised relevant market.
3 Given the fact that CLECs serve such a small percentage of even
4 present high capacity service customer locations, the potential
5 harm to captive customers from unjustified price increases is a
6 real threat. That is emphasized by the fact that USWC refuses to
7 agree to a price cap for its high capacity services at levels
8 that it acknowledges are well above cost.

9 TRACER would agree with USWC and Staff that no price cap
10 would be necessary if effective, price-constraining competition
11 really existed for these services. However, this is not a case
12 where it is simply uncertain whether effective competition
13 exists. The evidence demonstrates conclusively that effective
14 competition does not exist in the relevant market at this time.

15 USWC claims that a number of public benefits could flow from
16 granting pricing flexibility, including the elimination of the
17 tariff notice requirements and reduction of administrative costs.
18 These public benefits can be achieved by TRACER's recommendation
19 that any competitive classification be conditioned on a price
20 cap. Downward pricing flexibility for services which USWC
21 acknowledges are priced well above cost is all that competition
22 requires. The price cap also would protect against USWC's abuse
23 of its market power, thereby protecting consumers. What the
24 price cap would not do, however, is prevent USWC from using
25 pricing flexibility to deter efficient entry or engage in
26 exclusionary pricing behavior. The Commission would have to

1 conclude that other facts would ensure that the likelihood of
2 such behavior has been eliminated or is minimal.

3 **The FCC's Pricing Flexibility Framework for Special Access and**
4 **Dedicated Transport Services Is Fundamentally Flawed, Does Not**
5 **Satisfy Washington Statutory Requirements, and Is Irrelevant for**
6 **This Proceeding.**

7 In its recent Pricing Flexibility Order the FCC adopted a
8 new framework for granting price cap LECs flexibility in the
9 pricing of their services. Previously, the FCC has required
10 incumbent LECs to demonstrate that they no longer possess market
11 power in the provision of access services to receive pricing
12 flexibility. It based non-dominance findings on several
13 criteria, including market share and supply elasticity. Because
14 these showings are not administratively simple and generate
15 controversy that is difficult to resolve, the FCC decided to
16 adopt a simpler, "bright-line" test to avoid administrative
17 burdens.²⁰

18 The FCC's pricing flexibility framework consists of two
19 phases; relief is granted for an MSA (Metropolitan Statistical
20 Area). In order to obtain Phase I regulatory relief, ILEC's must
21 show that unaffiliated competitors have made irreversible or
22 "sunk" investments in the facilities needed to provide the
23 services at issue. For example, for dedicated transport and
24 special access services, ILECs must demonstrate that unaffiliated
25 competitors have collocated in at least 15 percent of the LEC's
26 wire centers within an MSA or collocated in wire centers

²⁰ FCC's Pricing Flexibility Order ¶¶ 78, 90.

1 accounting for 30 percent of the LEC's revenues from these
2 services within an MSA. Higher thresholds apply for channel
3 terminations between a LEC end office and an end-user customer:
4 LECs must demonstrate that unaffiliated competitors have
5 collocated in 50 percent of the LEC's wire centers within an MSA
6 or collocated in wire centers accounting for 65 percent of the
7 LEC's revenues from this service within an MSA. With Phase I
8 relief, ILECs may offer contract tariffs, as well as volume and
9 term discounts. However, Phase I requires ILECs to maintain
10 their generally available price cap-constrained tariffed rates to
11 protect customers that lack competitive alternatives, and
12 prohibitions against undue discrimination still apply. Phase I
13 relief is basically equivalent to the flexibility ILECs enjoy
14 under Washington law without competitive classification.

15 Phase II relief requires ILECs to demonstrate that
16 competitors have established a significant market presence in the
17 provision of the service at issue (i.e., that competition for a
18 particular service within the MSA is sufficient to preclude the
19 ILEC from exploiting any individual market power over a sustained
20 period). Phase II relief for dedicated transport and special
21 access services is available when an ILEC demonstrates that
22 unaffiliated competitors have collocated in at least 50 percent
23 of the LEC's wire centers with an MSA or collocated in wire
24 centers accounting for 65 percent of the LEC's revenues from
25 these services within an MSA. Again, a higher threshold applies
26 to channel terminations: an ILEC must show that unaffiliated

1 competitors have collocated in 65 percent of the LEC's wire
2 centers within an MSA or collocated in wire centers accounting
3 for 85 percent of the LEC's revenues from this service within an
4 MSA. Once ILECs have made that showing, they will be allowed to
5 raise and lower their rates on one day's notice.

6 The specific thresholds are not based on any formula, but
7 literally picked from the air, as a policy decision, from
8 proceeding comments. Moreover, the FCC justifies its decision
9 through a determination that sunk investments in facilities is an
10 appropriate standard for determining whether price flexibility is
11 warranted because a substantial investment indicates a
12 willingness (at the lowest ebb) to compete with the incumbent
13 carrier.²¹ The Commission does not consider resale services that
14 employ only ILEC facilities to be considered sunk investments.²²

15 While TRACER understands the FCC's desire for simple tests
16 that avoid administrative burden, the simple fact is that the
17 benchmarks adopted the FCC tell very little, if anything, about
18 the true state of competition for the kind of services involved
19 in this proceeding. Whether a competitor has collocated in a
20 USWC wire center doesn't tell anything about whether that carrier
21 has extended facilities to end-user locations, or which ones.
22 The CLEC could be relying entirely on using USWC's unbundled
23 loops, which would not provide adequate alternatives for all of
24

25 ²¹The FCC concludes that collocation "usually represents a financial
26 investment by a competitor to establish facilities within a wire center." ¶ 81

²²See ¶111.

1 the services covered by the Amended Petition. Further, until the
2 outstanding issues surrounding service quality, facilities
3 provisioning, interconnection, and collocation have been
4 resolved, it cannot be said that the adequate, nondiscriminatory
5 availability of unbundled loops will support a finding of
6 effective competition. Unfortunately, the FCC's pricing
7 flexibility standards, while simple, are nonsensical.

8 More importantly, the FCC's pricing flexibility framework
9 does not comply with the requirements of RCW 80.36.330. The FCC
10 may believe that, in the name of avoiding work, it has the
11 authority to relieve ILECs of the requirement of demonstrating
12 that they no longer possess market power in the provision of the
13 services to receive pricing flexibility. Washington law does not
14 permit this Commission to do the same. In short, the FCC's
15 pricing flexibility framework is not only ill-suited to measuring
16 the true extent of competitive pressure on ILECs, it is
17 irrelevant to the inquiry required in this proceeding.

1 **CONCLUSION**

2 TRACER acknowledges that proving the absence of market power
3 can be difficult. However, the evidence that is available here
4 shows that USWC retains market power over the services it wants
5 to competitively classify. In an effort to simplify the process
6 and grant the only pricing flexibility that is really required by
7 competition, while protecting consumers from the potential
8 exploitation of market power by USWC, TRACER proposed that
9 competitive classification could be granted if it were
10 conditioned on capping USWC's high capacity service prices at
11 their present level. This would at least protect against harm to
12 consumers from unjustified price increases. Other measures would
13 have to be taken or the Commission would have to be convinced
14 that exclusionary pricing behavior against developing competition
15 would not occur. In any case, USWC has rejected that suggestion.
16 TRACER submits that leaves only denial of the Amended Petition as
17 a viable option.

18 DATED this 10th day of September, 1999.

19 Respectfully submitted,

20 ATER WYNNE LLP

21
22 _____
23 Arthur A. Butler
24 WSBA # 04678
25 Attorneys for TRACER
26